

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

JILL A. SPROUT)	
Claimant)	
V.)	
)	
HOSPIRA, INC.)	
Respondent)	Docket Nos. 1,043,040
AND)	& 1,048,052
)	
XL SPECIALTY INSURANCE COMPANY and)	
FIDELITY & GUARANTY INSURANCE COMPANY)	
Insurance Carriers)	

ORDER

Claimant appealed the June 25, 2015, Review & Modification Award entered by Administrative Law Judge (ALJ) Bruce E. Moore. The Board heard oral argument on October 23, 2015, in Wichita, Kansas.

APPEARANCES

Joseph Seiwert of Wichita, Kansas, appeared for claimant. Jeffery R. Brewer of Wichita, Kansas, appeared for respondent and its insurance carriers.

RECORD

The record considered by the Board is listed in the Review & Modification Award and also includes the transcripts of claimant's February 23, 2009, evidentiary deposition and the April 1, 2011, preliminary hearing, excluding the preliminary hearing exhibit.¹ At oral argument, the parties agreed the March 6, 2012, settlement hearing transcript and the Joint Award Agreement attached thereto are part of the record. The parties stipulated that in Docket No. 1,048,052, claimant sustained a 100 percent wage loss beginning December 31, 2014, had a 79% task loss and is entitled to an 89.5% work disability.

¹ The transcripts of claimant's February 23, 2009, evidentiary deposition and the April 1, 2011, preliminary hearing were not listed as part of the record in the Review & Modification Award. The parties agreed the aforementioned transcripts are part of the record.

ISSUES

These claims were settled by the parties on March 6, 2012. In a June 25, 2015, Review & Modification Award, ALJ Moore determined claimant was entitled to disability compensation in Docket No. 1,043,040 for an increase in claimant's whole body functional impairment of 2 percent and in Docket No. 1,048,052 for an increase in claimant's whole body functional impairment of 4 percent and effective December 31, 2014, an 89.5 percent work disability.

Claimant contends her award in Docket No. 1,048,052 should be calculated using the method set forth by the Kansas Court of Appeals in *Ponder-Coppage*.²

Respondent asserts:

In his Award, ALJ Moore incorrectly allowed the cases to be divided for purposes of functional impairment and work disability increase for review & modification purposes. That was not the agreement of the parties at the time of [the] Joint Award Agreement and the Joint Award Agreement is binding. Under the law and by the terms of the settlement, both case[s] were consolidated for "one" Award. As such, the cases become "one" for all future rights and defenses. This includes the statutory cap per KSA 44-510f(a)(2) for "all" prior TTD, prior PPD, prior TPD at \$100,000.00 aggregate.³

Respondent requests the Board modify the Review & Modification Award to allow claimant to receive benefits not to exceed \$100,000 as allowed by law.

The issues are:

1. Should claimant's temporary total disability (TTD) and permanent partial disability (PPD) payments be limited to \$100,000 for both claims?
2. How should claimant's review and modification award in Docket No. 1,048,052 be calculated?

FINDINGS OF FACT

The Review & Modification Award sets out findings of fact that are detailed and accurate and it is not necessary to repeat those findings of fact herein. The Board adopts the ALJ's findings of fact as its own, except as hereinafter noted.

² *Ponder-Coppage v. State*, 32 Kan. App. 2d 196, 83 P.3d 1239 (2002).

³ Respondent's Brief at 3 (filed Aug. 19, 2015).

At the time of claimant's accident that gave rise to Docket No. 1,043,040 (July 20, 2008, and after), XL Specialty Insurance Company (XL) had coverage. Fidelity & Guaranty Insurance Company (Fidelity) had coverage at the time of claimant's accident that gave rise to Docket No. 1,048,052 (June 15, 2009, and after).⁴

During the settlement hearing, the Special Administrative Law Judge (SALJ) recited separately claimant's average weekly wage (AWW) at the time of each accident. Claimant's AWW in Docket No. 1,043,040 was \$730.92⁵ and in Docket No. 1,048,052 it was \$734.31⁶. At the settlement hearing, the SALJ used the terms "the award," "the settlement" and "this case." The Joint Award Agreement attached to the settlement hearing transcript lists two docket numbers, two separate dates of accident, two separate average weekly wages and stated, "Both claims and docket numbers consolidated for one Joint Award Agreement."⁷ The Joint Award Agreement indicates claimant was paid 30.5 weeks of compensation at the rate of \$487.30, totaling \$14,861.26, and \$35,176.02 was paid in medical expenses.

Respondent's counsel, who also represented both Fidelity and XL, indicated the two insurance carriers would be liable for claimant's future benefits, medical and otherwise. Respondent, Fidelity and XL agreed to pay claimant \$49,757.59 in PPD benefits representing a 25.5 percent whole body functional impairment. The following exchange took place between the SALJ and claimant:

THE COURT: To try to put this in simple language, at this point they are offering to pay you \$49,757.59, and if you accept that amount of money today that's all the money you are going to receive at this time as a result of this injury, and you are not going to be entitled to any additional money or any additional medical treatment unless you come back and reopen the case to seek what's called review and modification if the extent of your impairment, or for that matter, your work disability, if any, should change, or unless you come back and file an application for post-award medical treatment with the Director of Workers' Compensation to get more medical treatment or benefits, so do you understand that this is all the money they are going to pay at this time as a result of this injury; do you understand that?

THE CLAIMANT: Yes.⁸

⁴ The information in this paragraph as to the insurance carrier providing coverage at the time of each accident is indicated by the Division of Workers Compensation's records.

⁵ Claimant's benefit rate based on the average weekly wage in Docket No. 1,043,040 is \$487.30.

⁶ Claimant's benefit rate based on the average weekly wage in Docket No. 1,048,052 is \$489.56.

⁷ S.H. Trans., Joint Award Agreement.

⁸ S.H. Trans. at 9-10.

On October 19, 2012, claimant filed an application for review and modification requesting an increased impairment. A review and modification hearing was held on November 4, 2014. Claimant filed another application for review and modification on January 9, 2015, asserting a work disability. As noted above, the ALJ issued a June 25, 2015, Review & Modification Award granting claimant additional compensation in both claims, which states:

This modification of Claimant's March 6, 2012 Agreed Award is effective as of October 19, 2012, the date of the filing of the Application for Review and Modification, as to any increases in functional impairment, and December 31, 2014, as to any claim for work disability.

In computing the benefits to which Claimant is entitled under this Review and Modification Award, the court notes that from June 15, 2009 until December 30, 2014, a period of 288.43 weeks, Claimant remained at comparable wages. Those weeks are deducted from the maximum of 415 weeks for which Claimant may receive workers compensation benefits. **K.S.A. 44-510e(a)**. Respondent is given credit for payments previously made, and for the 288.43 weeks during which Claimant was at comparable wage.

...

Docket No. 1,043,040

The Claimant is entitled to 7.28 weeks at the rate of \$487.30 per week or \$3,547.54 for a two (2)% functional whole body disability, making a total award of \$3,547.54.

As of June 25, 2015 there would be due and owing to the claimant 7.28 weeks of permanent partial compensation at \$487.30 per week in the sum of \$3,547.54, for a total due and owing of \$3,547.54, which is ordered paid in one lump sum less amounts previously paid.

Docket No. 1,048,052

The Claimant is entitled to 14.57 weeks at the rate of \$489.56 per week or \$7[,]132.89 for a four (4)% functional whole body disability, followed by 54.76 weeks at the rate of \$489.56 per week or \$26,808.31 for a[n] 89.5% work disability, making a total award of \$33,941.20.

As of June 25, 2015 there would be due and owing to the claimant 14.57 weeks of permanent partial compensation at \$489.56 per week in the sum of \$7[,]132.89, plus 25.29 weeks of compensation at \$489.56 per week in the sum of \$12,380.97, for a total due and owing of \$19,513.86, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the

amount of \$14,427.34 shall be paid at \$489.56 per week for 29.47 weeks or until further order of the Director.⁹

PRINCIPLES OF LAW AND ANALYSIS

Docket No. 1,043,040

Neither party contested the ALJ's finding that claimant sustained an additional 2 percent whole body functional impairment in Docket No. 1,043,040. Therefore, the Board affirms the Review & Modification Award in that respect, but modifies the calculation of benefits as follows:

415 weeks - .25 weeks of TTD = 414.75 weeks.¹⁰ 414.75 weeks x 2 percent = 8.3 weeks of PPD benefits at \$487.30 per week, or \$4,044.59.

Docket No. 1,048,052

Neither party contested the ALJ's finding that claimant sustained an additional 4 percent whole body functional impairment in Docket No. 1,048,052. Therefore, the Board affirms that finding. However, the Board modifies the calculation of claimant's additional functional impairment as follows:

415 weeks - .25 weeks of TTD = 414.75 weeks. 414.75 weeks x 4 percent = 16.59 weeks of PPD benefits at \$489.56 per week, or \$8,121.80.

K.S.A. 44-510f(a)(3) provides an injured worker's TTD and PPD benefits shall not exceed \$100,000 for his or her injury.

Claimant argues she did not agree to limit her recovery in her two claims to \$100,000. The Board concurs. In *Hill*,¹¹ the Kansas Court of Appeals stated:

A brief summary of Kansas contract law is necessary to properly evaluate this issue. When determining whether a settlement agreement was formed, it is important to remember "[t]he law favors settlement of disputes," [citation omitted,] over protracted litigation. *O'Neill v. Herrington*, 49 Kan. App. 2d 896, 903, 317 P.3d 139 (2014), *rev. denied* 301 Kan. ____ (2015). To form a binding settlement

⁹ Review & Modification Award at 7-8.

¹⁰ The parties indicated at the settlement hearing claimant received 30.5 weeks of TTD. Those weeks are apportioned equally between the two claims, or 15.25 weeks per claim. K.S.A. 44-510e(a)(2) provides the number of weeks claimant received TTD, excluding the first 15 weeks, is subtracted from 415 weeks.

¹¹ *Hill v. Hutchinson Care Center, L.L.C.*, No. 111,615, 2015 WL 5927073 (Kansas Court of Appeals unpublished opinion filed Oct. 9, 2015).

agreement, there must be a meeting of the minds on all of the material terms of the parties' bargain and a manifestation of an intention to be bound by these terms; any nonmaterial discrepancies can be resolved by the court, consistent with the parties' intent, if the parties have agreed upon the material terms. See *U.S.D. No. 446*, 295 Kan. at 282, 286 P.3d 542; *O'Neill*, 49 Kan. App. 2d 896, Syl. ¶ 4, 903, 317 P.3d 139.

A detailed review of the record, including the settlement hearing transcript and Joint Award Agreement attached thereto, convinces the Board claimant did not agree to settle her two claims by limiting her TTD and PPD benefits to \$100,000 for both claims. There is no order in the record or language in the settlement hearing transcript or Joint Award Agreement indicating claimant agreed to limit her TTD and PPD benefits to \$100,000 for both claims. Merely because the SALJ used language such as “the award,” “the settlement” and “this case” does not mean claimant agreed to limit her TTD and PPD benefits to \$100,000. The claims were consolidated for settlement purposes, but claimant did not agree to give up her statutory rights under each separate claim. Simply put, there is insufficient evidence there was a “meeting of the minds” between the parties that claimant agreed to consolidate her claims and limit her TTD and PPD benefits to \$100,000 for both claims.

Claimant argues her work disability in Docket No. 1,048,052 should have been calculated using the method set forth in *Ponder-Coppage*.¹² There, the Kansas Court of Appeals stated:

K.S.A. 44-510e(a) sets forth the number of weeks that compensation is received but limits that compensation to 415 weeks from the date of the work-related accident. Consequently, even if the effective date of a modified award is 6 months before the application was filed, the modified award only compensates for the remaining unpaid weeks, if any, that are proven but not yet expired. If an employer has paid the maximum amount, the modified award does not offer further payment.

Applying the calculations to claimant's accident on August 23, 1994, made August 16, 2002, the end of the 415 weeks for which she could receive benefits. The maximum number of weeks for which she was entitled to compensation based upon a 23% work disability was 95.05 weeks. The Board found that after deducting the previous payments for 20.66 weeks for permanent partial disability based upon a 5% functional impairment, claimant was entitled to 74.39 weeks at \$252.32 per week, or a total of \$18,770.08, for her permanent partial general disability based upon a 23% work disability. Because her application for modification was filed in

¹² *Ponder-Coppage v. State*, 32 Kan. App. 2d 196, 83 P.3d 1239 (2002).

1998, the remaining 74.39 unpaid weeks occurred before the 415 weeks authorized in K.S.A. 44-510e(a) had expired.¹³

Until *Ponder-Coppage* is reversed or modified, the Board is bound by its precedent. Claimant's work disability in Docket No. 1,048,052 began on December 31, 2014. She filed her initial application for review and modification on October 19, 2012. Therefore, pursuant to K.S.A. 44-528(d), claimant's award in Docket No. 1,048,052 is modified effective October 19, 2012, with regard to her increased functional impairment and effective December 31, 2014, with regard to her work disability. The effective date of claimant's increased functional impairment in Docket No. 1,043,040 is October 19, 2012.

Claimant's accident in Docket No. 1,048,052 was on June 15, 2009. K.S.A. 44-510e(a) restricts claimant's disability compensation to 415 weeks following the date of the work injury, or May 29, 2017. Consequently, claimant's PPD benefits end no later than May 29, 2017. The Board calculates claimant's PPD benefits as follows:

- 415 weeks - .25 weeks of TTD = 414.75 weeks. 414.75 x 89.5 percent for claimant's work disability = 371.2 weeks.
- 371.2 weeks - 52.88 weeks for the original award of 12.75 percent functional impairment¹⁴ and 16.59 weeks for the 4 percent functional impairment awarded on review and modification = 301.73 weeks.
- December 31, 2014, through May 29, 2017, the latter date being 415 weeks from claimant's date of accident, is a period of 125.86 weeks.
- As calculated above, claimant is entitled to \$8,121.80 for her additional 4 percent functional impairment and for her work disability is entitled to \$489.56 per week beginning December 31, 2014, and not going beyond May 29, 2017, for a total award upon review and modification not to exceed \$67,690.57.¹⁵

¹³ *Id.* at 200.

¹⁴ When the two claims were settled, the parties did not specify what portion of claimant's 25.5 percent permanent partial impairment was assigned to each claim. Therefore, the Board assigns 12.75 percent permanent partial impairment to each claim. In the past, where a claimant received temporary total disability payments simultaneously in two claims, the Board has divided the temporary total disability between the two claims. See *Archer v. Sun & Swim Pools, Inc.*, Nos. 1,039,402 & 1,039,492, 2012 WL 2890454 (Kan. WCAB June 13, 2012).

¹⁵ The total award in Docket No. 1,048,052, including amounts paid pursuant to the March 6, 2012, settlement, is not to exceed \$100,000.

CONCLUSION

1. In Docket No. 1,043,040, claimant is entitled to an additional 2 percent whole body functional impairment.

2. In Docket No. 1,048,052, claimant is entitled to an additional 4 percent whole body functional impairment and an 89.5 percent work disability. Pursuant to K.S.A. 44-510e(a), claimant is entitled to PPD benefits not going beyond May 29, 2017. Claimant's award is re-calculated using the method prescribed in *Ponder-Coppage*.¹⁶

3. In each of the aforementioned claims, claimant is entitled to TTD and PPD benefits not to exceed \$100,000.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.¹⁷ Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board modifies the June 25, 2015, Review & Modification Award entered by ALJ Moore as follows:

Docket No. 1,043,040

Pursuant to the terms of the March 6, 2012, settlement, claimant has been paid temporary total disability benefits of \$7,430.63 and \$24,878.79 in permanent partial disability benefits for a total of \$32,309.42.

Effective October 19, 2012, claimant is entitled to receive an additional 8.3 weeks of permanent partial disability benefits at the rate of \$487.30 per week, or \$4,044.59, for a 2 percent whole body functional impairment, all of which is due and owing, less amounts previously paid.

Docket No. 1,048,052

Pursuant to the terms of the March 6, 2012, settlement, claimant has been paid temporary total disability benefits of \$7,430.63 and \$24,878.80 in permanent partial disability benefits for a total of \$32,309.43.

¹⁶ *Ponder-Coppage v. State*, 32 Kan. App. 2d 196, 83 P.3d 1239 (2002).

¹⁷ K.S.A. 2014 Supp. 44-555c(j).

Effective October 19, 2012, claimant is entitled to receive an additional 16.59 weeks of permanent partial disability benefits at the rate of \$489.56 per week, or \$8,121.80, for a 4 percent whole body functional impairment.

Effective December 31, 2014, claimant is entitled to receive 121.68 weeks of permanent partial disability benefits at the rate of \$489.56 per week, or \$59,568.77, for an 89.5% work disability, and a total award upon review and modification not to exceed \$67,690.57.¹⁸

As of December 10, 2015, claimant is entitled to receive 16.59 weeks of permanent partial disability benefits at the rate of \$489.56 per week, or \$8,121.80, followed by 49.29 weeks of permanent partial disability benefits at the rate of \$489.56 per week, or \$24,130.41, for a total due and owing of \$32,252.21, which is ordered paid in one lump sum, less amounts previously paid. Thereafter, the remaining balance of \$35,438.36 shall be paid at the rate of \$489.56 per week until paid or until further order of the Director.

The Board adopts the remaining orders set forth in the Review & Modification Award that are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of December, 2015.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

¹⁸ The total award in Docket No. 1,048,052, including amounts paid pursuant to the March 6, 2012, settlement, is not to exceed \$100,000.

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Honorable Bruce E. Moore, Administrative Law Judge